Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1999

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,

Petitioners,

UNITED STATES OF AMERICA

Intervenor,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Congress have the power under the Fourteenth Amendment to prohibit states from charging victims of discrimination fees for measures designed to remedy the discrimination?

2. Is Title II of the Americans with Disabilities Act within Congress' power to enforce the Fourteenth Amendment?

PARTIES

The parties to the proceedings for which review is sought are those appearing on the caption. This case was brought as a class action against the North Carolina Division of Motor Vehicles ("DMV") by Willie M. Brown, David S. Bagley, Joan Bagley, Orris Cross and Russell Anderson on behalf of all persons who purchased placards from DMV allowing use of accessible parking. The district court did not reach the issue of class certification.

The United States intervened in the proceedings before the Fourth Circuit Court of Appeals.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Statutes and Regulations Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

I. Congress Has the Power under the Fourteenth Amendment To Prohibit States from Charging Victims of Discrimination Fees for Measures Designed To Remedy the Discrimination 4

II. Title II of the ADA Is Within Congress' Power To Enforce the Fourteenth Amendment 10

Conclusion 12

Appendix

Fourth Circuit Opinion A-1

District Court Opinion A-25

Denial of Rehearing A-45

Text of Constitution, Statutes and Regulations A-47

TABLE OF AUTHORITIES

Cases

Alsbrook v. City of Maumette, No. 97-1825, 1999 WL 521709 (8th Cir. July 23, 1999) (en banc) (cert. petition filed on September 7, 1999) 11, 12

Amos v. Maryland Department of Public Safety and Correctional Services, 178 F.3d 212 (4th Cir. June 24, 1999) 11

City of Boerne v. Flores, 117 S.Ct. 2157 (1997) 9

Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998) 10

Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), cert. denied, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998) 10

Crawford v. Indiana Department of Corrections, 115 F.3d 481 (7th Cir. 1997) 11

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 8

Kimel v. Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998), cert. granted on other grounds, 109 S.Ct. 901 (1998) 10, 12

Martin v. Kansas, 1999 WL 635916 (10th Cir. August 19, 1999) 10

McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819) 8

Muller v. Costello, 1999 WL 599285 (2d Cir. August 11, 1999) 10

Torres v. Puerto Rico Tourism Company, 175 F.3d 1 (1st Cir. 1999) 11

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12132 ..... 2, 3, 4

42 U.S.C. § 12134 4

42 U.S.C. § 12202 ..... 2, 3

Civil Rights Act of 1964, Title IX 8

N.C. Gen. Stat. § 20-37.6(c) 3, 5

North Carolina General Statues § 20-37.6 2

Voting Rights Act of 1965 8

Regulations

23 C.F.R. pt. 36, App. A, § 4.6.2 4

28 C.F.R. § 35.130(f) ..... passim

Constitutional Provisions

U. S. Constitution, Amendment XI ..... passim

U. S. Constitution, Amendment XIV ..... passim

Petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 12, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 166 F.3d 698 (4th Cir. 1999) and reprinted in the Appendix beginning at p. A-1.

The opinion of the district court is published at 987 F.Supp. 451 (E.D.N.C. 1997) and reprinted in the Appendix beginning at p. A-25.

STATEMENT OF JURISDICTION

The Court of Appeals rendered its decision on February 12, 1999. Rehearing and rehearing en banc were denied without opinion, over three dissents, on May 11, 1999. (A-45) On August 2, 1999, the Chief Justice extended the time for the filing of this petition until September 8, 1999.

This Court has jurisdiction to review the judgment of the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case presents questions as to whether Congress has the power to enforce Section 5 of the Fourteenth Amendment by requiring states to provide nondiscriminatory treatment for persons with disabilities and prohibiting states from imposing fees for reasonably equivalent access. The questions involve Section 5 of the Fourteenth Amendment; the Eleventh Amendment; the prohibition against disability discrimination by public entities in the Americans with Disabilities Act of 1990 ("ADA") at 42 U.S.C. § 12132; the ADA's abrogation of Eleventh Amendment immunity at 42 U.S.C. § 12202; the ADA regulations codified at 28 C.F.R. § 35.130(f); and North Carolina General Statues § 20-37.6. The relevant constitutional provisions, statutes and regulations are reproduced in the Appendix beginning at p. A-47.

STATEMENT OF THE CASE

Petitioners/Plaintiffs, Willie M. Brown, David S. Bagley, Joan Bagley, Orris Cross, and Russell Anderson ("Plaintiffs"), on behalf of themselves and all others similarly situated, filed suit against the North Carolina Division of Motor Vehicles ("DMV") in the United States District Court for the Eastern District of North Carolina, challenging a North Carolina law, N.C. Gen. Stat. § 20-37.6(c), that requires individuals with disabilities to pay a fee for placards to gain access to parking. Plaintiffs alleged that the placard fee violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(f).

DMV moved to dismiss Plaintiffs' complaint, arguing that the abrogation of Eleventh Amendment immunity for ADA claims in 42 U.S.C. § 12202 is invalid because the application of the ADA to the States exceeds Congressional authority under Section 5 of the Fourteenth Amendment. The District Court agreed, and dismissed Plaintiffs' case.

Plaintiffs timely appealed the order of dismissal to the United States Court of Appeals for the Fourth Circuit, which affirmed the dismissal with a published opinion dated February 12, 1999, with one dissent. The Fourth Circuit found that the prohibition of fees on access is not within Congress' Section 5 power, and so held that the Eleventh Amendment abrogation with respect to the regulation is invalid.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision -- that Congress lacks authority under Section 5 of the Fourteenth Amendment to prohibit the States from charging a fee for access required by the ADA -- merits review because the panel decided an important federal question in a way that conflicts with relevant decisions of this Court, and that conflicts with the decisions of other courts of appeals.

I. CONGRESS HAS THE POWER UNDER THE FOURTEENTH AMENDMENT TO PROHIBIT STATES FROM CHARGING VICTIMS OF DISCRIMINATION FEES FOR MEASURES DESIGNED TO REMEDY THE DISCRIMINATION.

Title II of the ADA prohibits state and local governments from discriminating against persons with disabilities, or otherwise acting to exclude persons with disabilities from the benefit of any government service, program, or activity. 42 U.S.C. § 12132. Pursuant to its authority under 42 U.S.C. § 12134, the United States Department of Justice promulgated regulations for the implementation of the ADA. The regulations require the provision of parking accommodations for persons with disabilities so as to allow reasonably equivalent access to public and private facilities. See, e.g., 23 C.F.R. pt. 36, App. A, § 4.6.2.

Regulations implementing Title II include a specific prohibition of any fee on rights of access provided by the ADA:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this Part.

28 C.F.R. § 35.130(f).

Despite Title II of the ADA and 28 C.F.R. § 35.130(f), North Carolina continues to require persons with disabilities to pay a $5.00 fee for a placard permitting the holder to park in specially designated parking spaces set aside for persons with disabilities. N.C. Gen. Stat. § 20-37.6(c).

Each plaintiff satisfies the criteria for a parking placard, has been required to pay a placard fee, and is an individual with a disability within the meaning of the ADA. On behalf of themselves and others similarly situated, the Plaintiffs contend that the placard fee violates the ADA and its implementing regulations.

Rejecting the Plaintiffs' claims, the Court of Appeals for the Fourth Circuit struck down the regulation that prohibits states from imposing surcharges:

> [W]e hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a

> constitutionally valid exercise of power, and the effort to abrogate must fail.

(A-13)

In promulgating 28 C.F.R. § 35.130(f), the Department of Justice imposed limited restrictions on the states so as to ensure reasonably equivalent access for individuals with disabilities. In his dissent, Judge Murnaghan accurately described the regulation that the majority held to be "beyond the remedial scope" of Congress' Section 5 power:

> [B]y its terms § 35.130(f) only applies to surcharges imposed on the disabled to cover the cost of measures taken "to provide that [disabled] individual or group with the nondiscriminatory treatment required by this Act or this Part." All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims. The very terms of the regulation provide for no more than that.
>
> . . .
>
> The regulation at issue here, which was promulgated by the Department of Justice pursuant to the ADA, merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group). Therefore, § 35.130(f) does not expand the rights of the disabled, but

> merely prevents a state from adding insult to injury by making the disabled pay for the correction of the injuries inflicted over the years.

(A-21-22)

The panel decision would permit states to undermine the ADA by imposing surcharges on individuals with disabilities whenever they use public services. Under the ADA, may a state charge people in wheelchairs a 50-cent fee to use a ramp to enter a public building? May a state require the blind to deposit a quarter before using an elevator that has been equipped with Braille numbers? Surely Congress has the authority under Section 5 to prohibit such facially discriminatory exactions.

Judge Murnaghan's conclusion summarizes what is at stake:

> Viewed in its proper light, § 35.130(f) not only is constitutional, but merely states expressly that which is intuitive. It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights

> Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

(A-24)

The regulation is a simple, reasonable measure to prevent public entities from limiting access by requiring payment of money. To rephrase Chief Justice Marshall's aphorism in McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L.Ed. 579 (1819), the power to charge a fee on access is the power to destroy the right of access. Congressional power under Section 5 to require accessibility for persons with disabilities, just as any other power under Section 5, necessarily includes the power to prohibit any monetary exaction that would interfere with or burden the rights to be enforced.

The majority opinion describes North Carolina's placard fee system as "a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities." (A-18) Elsewhere, the majority characterizes the $5.00 placard fee as "the most modest of all possible fees." (A-20) Contrary to the Fourth Circuit's suggestion, the size of the placard fee does not remove it from the scope of Congressional power to enforce the Fourteenth Amendment. In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),this Court invalidated, as a denial of equal protection, an annual $1.50 poll tax imposed by Virginia on all residents over 21. The surcharge at issue here is more invidious than that rejected in Harper because the state in this case has imposed the placard fee exclusively on the victims of discrimination. It would be as if Virginia, responding to the Voting Rights Act of 1965, imposed a registration fee of $1.50 on new African-American voters "to

recoup the costs" of adding previously disenfranchised citizens to the voting rolls. If Congress prohibited such a registration fee, this Court would presumably find that Congress acted within its Section 5 authority, despite the "modest" size of the fee.

"It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

In considering whether Congress acted within its Section 5 authority, the Fourth Circuit did not examine the ADA as a whole, but instead focused narrowly on the particular regulation upon which the Plaintiffs base their claims. The panel's narrow-focus approach is not supported by any precedent and is inconsistent with the approach taken by every other appellate court. All of the other cases that have considered Eleventh Amendment challenges to the ADA have analyzed the statute as a whole, instead of engaging in the kind of piecemeal dissection undertaken by the panel in this case. See cases cited in § II, infra at pp. 10-11. The panel's narrow-focus analysis undermines the deference granted to Congress and disregards the "congruence and proportionality" test prescribed in Boerne. City of Boerne v. Flores, 117 S.Ct. at 2164. The Court in Boerne recognized that the line between permissible remedial legislation and substantive definitional legislation will often be difficult to draw, but that "Congress must have wide latitude in determining where it lies." Id. at 2164. The Fourth Circuit's narrow-focus analysis ignores these fundamental precepts, and instead invites courts to engage in the most intrusive form of judicial legislation.

The regulation at issue here is a reasonable and proportionate means to secure equal access for individuals with disabilities. In invalidating the regulation, the Fourth Circuit improperly restricted Congress' broad Section 5 authority. The Court should review the Fourth Circuit decision, and restore the proper balance between judicial and Congressional power.

II. TITLE II OF THE ADA IS WITHIN CONGRESS' POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

The district court held that, in enacting the ADA, Congress exceeded its powers under Section 5 of the Fourteenth Amendment. Basing its decision on the constitutionality of 28 C.F.R. § 35.130(f), the Fourth Circuit did not pass on the constitutionality of the statute itself. Because the Plaintiffs' claims hinge on the constitutionality of both the statute and the regulation, this appeal presents the question of whether Title II of the ADA exceeds Congress' Section 5 powers, an issue that has divided the circuit courts.

Six circuit courts have held unequivocally that Congress' statutory abrogation of Eleventh Amendment immunity in the ADA is a valid exercise of its Section 5 enforcement powers. Martin v. Kansas, 1999 WL 635916 (10th Cir. August 19, 1999); Muller v. Costello, 1999 WL 599285 (2d Cir. August 11, 1999); Kimel v. Florida Board of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), cert. granted on other grounds, 109 S.Ct. 901-02 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), cert. denied, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998); Crawford v. Indiana Department of Corrections, 115 F.3d 481, 487 (7th Cir. 1997). See also

Corrections, 115 F.3d 481, 487 (7th Cir. 1997). See also Torres v. Puerto Rico Tourism Company, 175 F.3d 1, 6 n. 7 (1st Cir. 1999) (declining to address the issue but stating: "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision.").

One circuit court disagrees. In a recent 6-4 en banc decision, the Court of Appeals for the Eighth Circuit held that extending Title II of the ADA to the states was not a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment. Alsbrook v. City of Maumette, No. 97-1825, 1999 WL 521709 (8th Cir. July 23, 1999) (en banc) (cert. petition filed on September 7, 1999).

The Fourth Circuit has straddled the fence. After the panel decision in this case ("Brown"), a different panel of the Fourth Circuit found the enactment of the ADA to be within Congress' power under Section 5. Amos v. Maryland Department of Public Safety and Correctional Services, 178 F.3d 212, 218 (4th Cir. June 24, 1999). The majority in Amos found that Brown did not control because that decision "considered the validity of a specific regulation promulgated under the ADA, and not the constitutionality of the ADA itself as applied to state agencies." Id. at 221, n.8. In dissent, Judge Williams endorsed the reasoning in Brown, argued that the Brown decision should control in Amos, and concluded that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in attempting to abrogate the states' sovereign immunity in the ADA. Id. at 229-30.

The question of the validity of Congress' abrogation of Eleventh Amendment immunity in the ADA is now pending on petitions for certiorari from the decision of the Eleventh

Circuit in Kimel and from the decision of the Eighth Circuit in Alsbrook. Plaintiffs ask the Court to grant this petition and resolve the circuit conflict on this important question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

September 8, 1999

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	No. 97-2784
UNITED STATES OF AMERICA,	)	
Intervenor,	)	
v.	)	
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terence W. Boyle, District Judge
(CA 5:96-CV-689-BO(1))

Argued: October 26, 1998
Decided: February 12, 1999

Before WILKINSON, Chief Judge, MURNAGHAN, Circuit Judge, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Chief Judge WILKINSON wrote the majority opinion, in which Judge MOON joined. Judge MURNAGHAN wrote a dissenting opinion.

COUNSEL

ARGUED: Seth Michael Galanter, United States Department of Justice, Washington, D.C., for Intervenor. Stephen Russell Senn, Peterson & Meyers, P.A., Lakeland, Florida, for Appellants. James Peeler Smith, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellee. **ON BRIEF**: Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay Silver, United States Department of Justice, Washington, D.C., for Intervenor. J. Davis Connor, Peterson & Meyers, P.A., Lakeland, Florida; Robert Joseph Antonello, Robert G. Fegers, Antonello & Fegers, Winter Haven, Florida; Melinda Lawrence, Burton Craige, Leto Copeley, Patterson, Harkavy & Lawrence, L.L.P., Raleigh, North Carolina, for Appellants. Michael F. Easley, North Carolina Attorney General, Hal F. Askin Special Deputy Attorney General, C. Norman Young, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellee.

OPINION

WILKINSON, Chief Judge:

Five purchasers of North Carolina handicapped parking placards sued the state Division of Motor Vehicles (DMV) on behalf of themselves and all those similarly situated to recover a five dollar fee the state charged for the placard. Plaintiffs claimed the fee violated 28 C.F.R. § 35.130(f), promulgated under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12134. That regulation prohibits public entities from charging a fee to cover the costs of accessibility programs designed to assist the disabled.

The district court found that in passing the ADA, Congress exceeded its powers under Section 5 of the Fourteenth Amendment, and thus Congress could not abrogate sovereign immunity under the test set forth in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Because we find that under *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), 28 C.F.R. § 35.130(f) exceeds Congress' Section 5 powers, we affirm the district court's dismissal of this suit for want of subject matter jurisdiction.

I.

Since 1972 the state of North Carolina has provided a system of handicapped parking for its disabled citizens. *See* An Act to Provide Special Parking Privileges for Disabled Persons, ch. 374, 1971 N.C. Sess. Laws 305. The state has continuously maintained and updated that system in the ensuing decades. *See, e.g.*, An Act to Clarify the Law Pertaining to Parking Privileges for the Handicapped, ch. 632,

1979 N.C. Sess. Laws 662; An Act to Provide for the Enforceable Designation of Handicapped Parking Signs, ch. 843, 1987 N.C. Sess. Laws 2031. The current system allows persons with mobility impairments to obtain special license plates and removable windshield placards. N.C. Gen.Stat. § 20-37.6(b) & (c). These plates and placards permit the holder to park in any parking space reserved for handicapped persons. *Id.* § 20-37.6(a). To receive a placard, an applicant must provide medical certification of mobility impairment. *Id.* § 20-37.6(c1). The placard is valid for five years and is renewable. *Id.*

North Carolina law further provides that the DMV "may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard." *Id.* § 20-37.6(c). In accordance with this provision, the DMV charges five dollars for the placard--a fee equal to one dollar a year--to recover the costs of administering the program. From 1990 to 1996, the DMV issued some 573,450 parking placards to assist its citizens with disabilities.

Nearly twenty years after North Carolina began providing for handicapped parking, Congress passed the Americans with Disabilities Act, Pub.L. No. 101-336, 104 Stat. 327 (1990). Title II of the ADA requires that no disabled person, "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II delegates authority to the Attorney General to promulgate implementing regulations within one year after the ADA's effective date. *Id.* § 12134. Pursuant to that grant, the Department of Justice promulgated rules requiring the creation of handicapped accessible parking spaces. 28 C.F.R.

§§ 35.150-.151; *id.* pt. 36, app. A; *see also id.* § 36.304. The Department's regulations further require that

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Id. § 35.130(f).

Appellants are persons with disabilities who paid a five dollar fee to the DMV to receive a placard. On August 7, 1996, they filed suit in the Eastern District of North Carolina challenging, on behalf of themselves and all others similarly situated, the legality of the fee under 28 C.F.R. § 35.130(f). Appellants sought a declaration that the fee was unlawful and an injunction against its continued imposition. They also requested the repayment with interest of all fees illegally charged. The DMV interposed Eleventh Amendment sovereign immunity. In response, appellants argued that Congress, acting pursuant to Section 5 of the Fourteenth Amendment, abrogated that immunity when it passed the ADA. Neither party argued that the regulation was *ultra vires.*

The district court held that the Eleventh Amendment barred this suit. *Brown v. North Carolina Div. of Motor Vehicles*, 987 F.Supp. 451 (E.D.N.C.1997). The court found that Congress clearly intended to abrogate state sovereign immunity. *Id.* at 454-55. Nevertheless, the court held that

Congress could not do so because Title II of the ADA exceeded its remedial power under Section 5 of the Fourteenth Amendment. First, the court held that the ADA impermissibly mandated that disabled individuals were entitled to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 457-458. Second, the district court stated that the ADA was not remedial legislation at all, but instead created an entitlement for the especial advantage of disabled citizens. *Id.* at 458-59. Finding that Congress therefore failed to properly abrogate Eleventh Amendment immunity, the district court dismissed the suit for lack of subject matter jurisdiction. The placard holders appeal, and the United States has intervened.

II.

A.

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the text of the Amendment seems to restrict only the scope of diversity jurisdiction in federal court, the Amendment has long been interpreted to contain much broader limitations. In *Hans v. Louisiana*, the Supreme Court recognized that the "suability of a State without its consent" was "not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15, 16, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Since that time, the Court has reaffirmed this important principle of federalism embodied in the Eleventh Amendment. *See Seminole Tribe*, 517 U.S. at 54 n. 7, 116 S.Ct. 1114 (listing cases); *Booth v. Maryland*,

112 F.3d 139, 141-42 (4th Cir.1997) (reviewing the case law). State sovereign immunity includes the proposition that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The Supreme Court has held that Congress has a limited power to abrogate immunity. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Congressional abrogation of immunity must meet two requirements: Congress must "unequivocally express[ ] its intent to abrogate the immunity," and Congress must act "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *accord Seminole Tribe*, 517 U.S. at 55, 116 S.Ct. 1114.

To determine whether Congress has acted pursuant to a valid exercise of power, a court must ask, "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 59, 116 S.Ct. 1114. This inquiry itself has two components. First, the congressional action must be taken pursuant to a provision that entails the power to abrogate. For example, in *Seminole Tribe*, the Court held that Congress' Article I authority to regulate interstate and Indian commerce does not include the power to abrogate a state's Eleventh Amendment immunity. *Id.* at 59-73, 116 S.Ct. 1114; *see also In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1145 (4th Cir.1997) (noting that "Congress' powers under Article I cannot be construed to empower it to expand federal jurisdiction by abrogating the states' sovereign immunities"), *cert. denied*, --- U.S. ----, 118 S.Ct. 1517, 140 L.Ed.2d 670 (1998). The Fourteenth Amendment, on the

other hand, does include the power to abrogate--the Supreme Court has held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. 2666 (citation omitted).

Second, the statute seeking to abrogate immunity must be constitutional. In the context of a purported exercise of the Section 5 power, this requirement means that a court must ensure that Congress was actually "acting pursuant to § 5 of the Fourteenth Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). If the scheme at issue exceeds the Section 5 power, it is without jurisdictional effect and cannot constitutionally abrogate immunity. *See Autio v. AFSCME, Local 3139*, 140 F.3d 802, 804-06 (8th Cir. 1998) (deciding constitutionality of congressional enactment in determining whether immunity was abrogated), *aff'd by an equally divided court*, 157 F.3d 1141 (8th Cir.1998) (en banc); *Coolbaugh v. Louisiana*, 136 F.3d 430, 433-38 (5th Cir.1998) (same), *cert. denied*, --- U.S. ----, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir.1997) (same), *cert. denied*, --- U.S. ----, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). In examining whether Congress abrogated Eleventh Amendment immunity, a court must "be able to discern some legislative purpose or factual predicate that supports the exercise of [the Section 5 power]. That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'...." *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). But the law must be supportable under Section 5 to be a valid exercise of power and effect an abrogation of state sovereign immunity.

B.

The parties disagree over what this review for constitutionality entails. The United States as intervenor argues that in reviewing a scheme purporting to abrogate state sovereign immunity, courts are to look broadly at the entire statutory framework--here Title II of the ADA--and ratify its constitutionality without looking at the validity of its individual provisions or the agency regulations promulgated under its authority. The government urges this court to examine the scheme in toto to see generally whether it is an effort to rectify discrimination that some group has suffered in the past. *See, e.g., Clark*, 123 F.3d at 1270 (holding the ADA to be a valid exercise of power after noting the connection between its antidiscriminatory aim and past discrimination). Because Title II encompasses such a general antidiscriminatory purpose, the government would have us go no further.

We disagree. To begin with, the broad-brush review proposed by the government requires courts to ratify unnecessarily the constitutionality of every provision in the title. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 104, 65 S.Ct. 152, 89 L.Ed. 101 (1944); *see also Ashwander v. TVA*, 297 U.S. 288, 345-48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Even if such a look is preliminary and cursory, its breadth is fundamentally at odds with separation of powers values.

Additionally, broad-look review raises difficult questions of administrability. In conducting that review, what is a court to do when it finds parts of a title constitutional and other parts unconstitutional? The temptation, of course, is to depart from broad-brush review in those cases and look specifically at the particular provision whose alleged violation gave rise to the lawsuit. But that leads to results that are no different from those obtained by examining the specific statute in the first instance.

Most importantly, the broad-look review urged upon us by the government glosses over the crucial federalism concerns that animate the Eleventh Amendment. Because the "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,' " *Dellmuth v. Muth*, 491 U.S. 223, 227, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (quoting *Scanlon*, 473 U.S. at 238, 105 S.Ct. 3142), courts must exercise great care before finding abrogation. "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis omitted). "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.* For that reason, the Supreme Court has consistently erected hurdles to a finding that Eleventh Amendment immunity does not bar suit. *See, e.g., Edelman*, 415 U.S. at 673, 94 S.Ct. 1347 (requiring express language or overwhelming implication before finding waiver); *Scanlon*, 473 U.S. at 243, 105 S.Ct. 3142 (requiring an unequivocal textual expression of congressional intent before finding abrogation).

Looking broadly at an entire title would leave under protected these important state interests in immunity. Ratifying an entire title and finding abrogation without examining the actual, specific legal basis for suit could subject a state to suit in federal court pursuant to an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme. Such a jurisprudence--one leading to sweeping validations of abrogation--would be completely discordant with the doctrine of dual sovereignty.

Moreover, sovereign immunity analysis in cases brought to enforce an agency regulation ought not end with the authorizing statute. Reviewing only the statute at issue--and ignoring the regulation whose alleged violation by the state gave rise to the action--would lead to the abrogation of immunity in cases even where the agency rule was unconstitutional or beyond the bounds of delegated authority. This is so because the statute itself--which may speak only in general terms--may be facially constitutional, despite the fact that the regulations promulgated under it are unconstitutional. Whether Congress acts directly in the form of a detailed statutory framework or whether it acts indirectly by broadly delegating to an agency the authority to promulgate detailed regulations is without import for Eleventh Amendment immunity. Focusing only upon the statute and ignoring the regulation would artificially hinge the weighty structural protections of state sovereign immunity upon a congressional choice of rulemaking efficacy.

Nor do the safeguards of federalism wither in the face of an overzealous bureaucracy intent upon imposing its will on the states. Regulations that unjustifiably intrude "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *Boerne*,

117 S.Ct. at 2171, are invalid exercises of power. Just as the Eleventh Amendment does not leave states without a shield when they confront congressional acts, states are not rendered defenseless in their duels with government by bureaucracy.

Reasons of separation of powers, administrability, and federalism thus dictate a searching review of the legal basis for suit. In determining whether Eleventh Amendment immunity is abrogated in a case involving a regulation, we first ask whether Congress intended to abrogate immunity. Then, in determining whether it was acting pursuant to a valid exercise of power, we examine the legality of the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court.

III.

We now proceed to apply this immunity test to this case. Appellee, as a department of the state, is immune from suit unless Congress has abrogated that immunity. *See Pennhurst*, 465 U.S. at 100, 104 S.Ct. 900. No party to this case contests that the first prong of the abrogation analysis is met. In passing the ADA, Congress made it "unmistakably clear" that it intended to abrogate sovereign immunity. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment ...from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

The question remains, therefore, whether the statute and regulation at issue were adopted pursuant to a valid exercise of congressional power. In passing the ADA, Congress made clear that it was invoking its powers under Section 5 of the Fourteenth Amendment. The ADA lists

among its purposes "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment..., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The mere invocation of the Section 5 power, however, is not dispositive. To abrogate, the statute and regulation must also be constitutional exercises of that power. Here, we hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a constitutionally valid exercise of power, and the effort to abrogate must fail.

A.

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Included in that article, of course, is the Equal Protection Clause. The Supreme Court in *City of Boerne v. Flores* held that "Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment.... The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." 117 S.Ct. at 2164. In other words, Congress has the power to remedy violations of constitutional rights, not to define the substance of those rights.

But the line between remedial and definitional exercises of the Section 5 power is often a fine one and "Congress must have wide latitude in determining where it

lies." *Id.* "[Section] 5 is a positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), and courts owe substantial deference to Congress when it seeks to remedy constitutional violations. Congress not only has the power to craft remedies that draw constitutional violations within their ambit, it also has the power to act prophylactically in response to persistent and pervasive constitutional violations. *See Boerne*, 117 S.Ct. at 2167. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional...." *Id.* at 2163.

Despite these broad powers, "the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (opinion of Black, J.); *see also Creative Goldsmiths*, 119 F.3d at 1146 ("[Section] 5 of the Fourteenth Amendment does not grant Congress a plenary power."). Section 5's own text suggests limitations which protect the federal balance: Congress may "enforce, by appropriate legislation." The yardstick used to measure whether an exercise of the congressional enforcement power is "appropriate" -- that is, whether it is remedial and not definitional -- was set forth in *Boerne*: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 117 S.Ct. at 2164. The end targeted must be "constitutional violations" or laws many of which "have a significant likelihood of being unconstitutional." *Id.* at 2163, 2170. And the means employed must be congruent and proportional

to any such violation. Unless the enactment is tailored to remedy particular constitutional violations, Congress lacks the power to invade the "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick*, 427 U.S. at 455, 96 S.Ct. 2666.

B.

Applying the congruence and proportionality test, appellant argues that 28 C.F.R. § 35.130(f) is entirely constitutional because it seeks only to enforce the Equal Protection Clause's ban on laws motivated by arbitrary and irrational discrimination. Appellant urges that in passing the ADA Congress found widespread discrimination and prejudice against individuals with disabilities. Congress noted that those individuals suffer from "stereotypic assumptions not truly indicative of ... individual ability" and from discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a). Congress concluded that disabled persons "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." *Id.* The United States as intervenor adds that the regulation is congruent and proportional because it seeks to prevent those laws most likely to be the result of invidious discrimination.

We disagree. Under *Boerne*, Section 5 enactments must target unconstitutional state action. The Constitution, however, has given state governments significant latitude in dealing with problems of disability. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87

L.Ed.2d 313 (1985), the Supreme Court held that classifications made on the basis of mental retardation need only satisfy a standard of rational basis review. The Court rejected the suggestion that mental retardation is a quasi-suspect classification, stating that "the distinctive legislative response, *both national and state*, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 443, 105 S.Ct. 3249 (emphasis added). The Court further noted that this "legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless." *Id.* at 445, 105 S.Ct. 3249. Rational basis review thus "affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.* at 446, 105 S.Ct. 3249. Given the Supreme Court's rationale, we cannot extend to the physically disabled a different standard of protection from that given to the mentally disabled. *Accord Autio*, 140 F.3d at 806 (noting that disability classifications are not entitled to heightened scrutiny); *Coolbaugh*, 136 F.3d at 433 n.1 (same); *Clark*, 123 F.3d at 1270 (same). The constitutionality of state laws affecting the disabled must thus be measured by rational basis review.

It is true, of course, that even rational basis review places limitations on states that Congress may seek to enforce. Irrational classifications or laws motivated by the desire to harm an unpopular group fail rational basis scrutiny.

Bankers Life & Cas. Co v. Crenshaw, 486 U.S. 71, 83, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review."); *see also Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Cleburne*, 473 U.S. at 446-47, 105 S.Ct. 3249. Thus, the validity of 28 C.F.R. § 35.130(f) turns in part upon whether Congress sought to remedy a specific unconstitutional state of affairs; that is, whether the end targeted was arbitrary state action or state action motivated by animus.

In passing the ADA, Congress did make substantial findings about many forms of discrimination against the disabled in American life. 42 U.S.C. § 12101(a). But general findings of discrimination alone, as regrettable and unfortunate as that state of affairs may be, do not justify denying state governments the basic ability to provide for their own citizens' health and welfare. Instead, Congress can intrude upon state prerogatives only when seeking to remedy or prevent particular constitutional violations. The Supreme Court has explained that Section 5 legislation will be upheld where it "rest[s] on unconstitutional discrimination by [a state] and Congress' reasonable attempt to combat it." *Boerne*, 117 S.Ct. at 2168. Animus "in the air," however, does not permit Congress to effect a wholesale redistribution of power between the states and the central government.

Here Congress, through the Attorney General, acted to ban state surcharges designed to recover the costs of programs provided for the benefit of disabled persons. Such an act is only sustainable under the Section 5 power if many of those surcharges "have a significant likelihood of being unconstitutional." *Id.* at 2170. In view of the efforts of

states to assist the handicapped, including the admirable efforts of North Carolina which are at issue here, that likelihood is not apparent to this court. Nor has any party pointed us to any support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class. It may well be that some subset of those surcharges is in fact so motivated. But on the record before us, we can only believe that most fees are like that imposed by North Carolina law--a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities. Such a fee is rationally based and perfectly constitutional under *Cleburne*.

Admittedly, Congress may act prophylactically if it faces a "subsisting and pervasive discriminatory -- and therefore unconstitutional -- use of" surcharges. *Id.* at 2167. But the prophylactic measures must still be congruent and proportional to the underlying unconstitutional state action. Section 35.130(f), like the statute at issue in *Boerne*, is not so tailored. The restrictions imposed by 28 C.F.R. § 35.130(f) "apply to every agency and official of the ... State[ ] and local Governments. [The regulation] applies to all ... state law, statutory or otherwise, whether adopted before or after its enactment. [It] has no termination date or termination mechanism. Any [surcharge] is subject to challenge at any time by any individual" with a disability. *Id.* at 2170 (citations omitted). Section 35.130(f) "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* Absent such congruence and proportionality, section 35.130(f) is best understood as definitional, not remedial, and therefore is beyond Congress' power under Section 5.

By imposing a ban on all surcharges, the regulations are definitional in an even more fundamental way. They attempt to create a positive entitlement to a free handicapped parking space. While such an undertaking may be commendable, it is a function of the state police power; nothing in the Constitution requires it. And federal regulations imposing it--when not congruent and proportional to unconstitutional state action--seek to redefine the Equal Protection Clause, transforming it from a prohibition on invidious state action into a charter of positive rights. Such a step, however, is beyond the scope of the Fourteenth Amendment. See *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (declining to find a right to "decent, safe, and sanitary housing" in the Equal Protection Clause).

Our holding that Congress, through the Attorney General, acted definitionally is reinforced by evidence in the statutory scheme itself. A congressional attempt to redefine the holding of *Cleburne* abounds. For example, in *Cleburne*, the Supreme Court declared that the mentally disabled were a "large and diversified group" and "doubt[ed] that the predicate for [heightened scrutiny] is present." *Cleburne*, 473 U.S. at 442-43, 105 S.Ct. 3249. The ADA, by contrast, specifically takes issue with the Court's definitional choice and declares that "individuals with disabilities are a discrete and insular minority." 42 U.S.C. § 12101(a)(7). This declaration evinces an intent not to remedy violations of the standard of *Cleburne*, but rather to effect a "substantive alteration of its holding." *Boerne*, 117 S.Ct. at 2171. In striking state legislation that is clearly rationally grounded, Congress sought to do what *Cleburne* said it may not do-- establish a new suspect or quasi-suspect equal protection classification.

IV.

The facts of this case demonstrate how far the structure of dual sovereignty has been distorted. North Carolina has maintained a long-standing program designed to benefit disabled persons through the provision of special parking spaces. In order to make the program effective, the state undertook to provide placards to those who were eligible to use the spaces. To cover the cost of the placards, North Carolina introduced the most modest of all possible fees--one dollar a year. A federal agency now seeks to deny the state even that meager option in administering the state's voluntary enforcement efforts. The United States further insists that the state may be called to answer for this alleged transgression in federal court. We hold, however, that the Eleventh Amendment forbids this course. To interpret Section 5 to abrogate the state's immunity would be a mark of profound constitutional disrespect to the role that states are meant to play within our federal system.* The judgment of the district court is hereby

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

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* Deciding this case on the basis of the constitutionality of 28 C.F.R. § 35.130(f), we need not pass on 42 U.S.C. § 12132 itself. And, holding that this case was rightfully dismissed for lack of jurisdiction, we do not reach the question whether 28 C.F.R. § 35.130(f) is a constitutional exercise of an Article I enumerated power. These and other issues remain if this matter is refiled in a state court with subject matter jurisdiction.

Because I believe that the ADA provision is a reasonable and valid exercise of Congress' powers pursuant to Section 5 of the Fourteenth Amendment, I respectfully dissent.

The majority opinion has detailed the applicable law with respect to Congress' ability to abrogate the states' sovereign immunity, and I need not recount that in great detail here. However, I question the majority's application of that law to 28 C.F.R. § 35.130(f.

First, I note that there is absolutely no basis to conclude that § 35.130(f) is anything like the now discredited RFRA. Unlike RFRA, the provisions of which applied to "laws ... [and] official actions of almost every description and regardless of subject matter," *see Boerne*, 117 S.Ct. at 2170, § 35.130(f) by its terms applies only to a certain class of laws (laws authorizing fees or surcharges) that in turn apply only to a certain class of people (the disabled). *See* 28 C.F.R. § 35.130(f). Moreover, by its terms § 35.130(f) only applies to surcharges imposed on the disabled to cover the cost of measures taken "to provide that [disabled] individual or group with the nondiscriminatory treatment required by this Act or this part." *Id.* All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims. The very terms of the regulation provide for no more than that.

Second, it troubles me to reach the notion that Congress cannot protect the disabled from discrimination because of the deferential rational basis standard of review accorded to state legislation. *See Clark*, 123 F.3d at 1271 (concluding that the standard of review to which state

legislation is subjected should not define Congress' boundaries for its enforcement powers under § 5). When Congress finds that invidious discrimination has plagued a class of people, it may act to ensure that the class receives equal protection under the law. See Amend XIV, § 5; *Ex parte Virginia*, 100 U.S. at 345-46. Congress has some discretion in how it chooses to respond to the problem, since "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision." *Boerne*, 117 S.Ct. at 2170.

As the Supreme Court made clear in *Cleburne*, the disabled, while not considered a suspect class, may not be subjected to arbitrary and invidious discrimination. *See* 473 U.S. at 446-47, 105 S.Ct. 3249. Here, Congress has made substantial findings that the disabled are subjected to just that type of discrimination in numerous arenas. *See* 42 U.S.C. § 12101 (1990). In response to that discrimination, Congress enacted the ADA, which has been found constitutional by all circuits that have reviewed it. *See Clark*, 123 F.3d at 1270-71 (9th Cir.1997); *Coolbaugh*, 136 F.3d at 438 (5th Circuit); *Autio*, 140 F.3d at 806, *aff'd by an equally divided court*, 157 F.3d 1141 (8th Cir.1998). The regulation at issue here, which was promulgated by the Department of Justice pursuant to the ADA, merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group). Therefore, § 35.130(f) does not expand the rights of the disabled, but merely prevents a state from adding insult to injury by making the disabled pay for the correction of the injuries inflicted over the years.

Finally, § 35.130(f) does not purport to provide the disabled with a "free" parking space. What few comments the Department of Justice made regarding § 35.130(f) indicate

that the measure was only designed to cover surcharges for services that the state was under an obligation to provide. *See* 28 C.F.R. Pt. 35, App. A (1998). The brief comments discussing § 35.130(f) relate to a request for clarification of the ability to charge for courtroom interpreters. *See id.* In response to the request, the Department adopted the standard set forth in its regulations pursuant to § 504 of The Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West Supp.1998), and stated that where the court system is obligated to provide an interpreter, it cannot charge the litigant. *See* 28 C.F.R. Pt. 35, App. A. The import of that statement is clear: where there is no obligation to provide an interpreter (or any other service), the state is under no obligation to pay for it.

The comments accompanying an identical provision in the ADA regulations applicable to public accommodations make it even clearer that the bans on surcharges found in the regulations were not intended to be broad-based bans on all surcharges applicable to the disabled but merely limited tools to help facilitate the remedial aims of the ADA. *See* 28 C.F.R. Pt. 36, App. B (1998). Like § 35.130(f), 28 C.F.R. § 36.302(c)(1998) prohibits an entity (public accommodations here) from "impos[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures ... that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." *Id.* The Department notes that it was asked whether daycare centers could charge fees for services rendered in addition to those required by the ADA, and it made clear that 28 C.F.R. § 36.302(c) "is intended only to prohibit charges for measures necessary to achieve compliance with the ADA." 28 C.F.R. Pt.36, App. B. Therefore, the bans on surcharges embodied in § 35.130(f)

and like provisions are not intended to redefine the rights of the disabled by guaranteeing them free access to services but are remedial measures designed to ensure that the disabled are not charged for services required to provide them with the level of treatment accorded to nondisabled persons.

Viewed in its proper light, § 35.130(f) not only is constitutional, but merely states expressly that which is intuitive. It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them. Therefore, I would reverse the district court's decision that it lacked subject matter jurisdiction to hear the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-689-BO(1)

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON,	)	
Plaintiffs,	)	
v.	)	ORDER
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant.	)	

This matter is before the Court on Plaintiffs' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Defendant's Motion to Dismiss, pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules. In the underlying action the named Plaintiffs, on behalf of a putative class, challenge the imposition of a fee for the issuance of parking placards which allow the use of parking spaces reserved for disabled persons. Plaintiffs allege that the fees charged by Defendant North Carolina Division of Motor Vehicles (hereinafter, the "DMV") violate the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA"), and regulations issued thereunder. Upon

consideration of the parties' arguments, and for the reasons discussed below, Defendant's Motion to Dismiss is GRANTED, and Plaintiff's Motion for Summary Judgment is dismissed as moot.

BACKGROUND

The named Plaintiffs in this matter suffer mobility impairments which satisfy the criteria for the issuance of a parking placard under North Carolina law. *See* N.C.Gen.Stat. §§ 20-37.5, 20-37.6. Each Plaintiff has purchased a parking placard for a five dollar fee, allowing him access to disabled parking spaces.

The creation of specially designated handicapped parking spaces close to the entrance to buildings is required by the North Carolina State Building Code, N.C.Gen.Stat. § 20-37.6, and by federal law, *see* 28 C.F.R. Pt. 36, App. A, § 4.6.2. North Carolina issues handicapped parking license plates and portable handicapped parking windshield placards to people with mobility impairments, allowing holders of such license plates and placards to use the reserved parking spaces. N.C.Gen.Stat. § 20-37.6(d), (f).

The North Carolina General Statutes detail the qualifications for obtaining a handicapped parking plate or placard. Among the impediments which qualify for issuance of a plate or placard are mobility impairments which prevent a person from walking 200 feet without stopping to rest or walking without the use of a cane or other assistive device. N.C.Gen.Stat. § 20-37.5(2). Also included are persons restricted by severe lung disease or who use portable oxygen; persons who have severe cardiac conditions, severely limited mobility due to arthritic, neurological, or orthopedic conditions; or persons who are severely visually impaired. Id.

It is not disputed that the named Plaintiffs qualify for issuance of the handicapped parking plates or placards under North Carolina law.

Qualifying persons apply for a handicapped placard by completing a North Carolina DMV application, obtaining a physician's signature, and paying the required fee. A handicapped plate, in contrast to the placards, may be issued only to a qualifying car owner. N.C.Gen.Stat. § 20-37.6(b). The plate is issued for the normal fee applicable to standard license plates. Id. According to the DMV, the placards are issued with far greater frequency than the license plates. Pl. Ex. 9.

The North Carolina General Assembly has provided that the DMV "may charge a fee sufficient to pay the actual cost of issuance [of the placard], but in no event less than five dollars ($5.00) per placard." N.C.Gen.Stat. § 20-37.6(c). The fees received by the DMV are paid into a "Highway Fund," and the expenses incurred are paid out of that fund. Deposition of Carol Howard, Director of Vehicle Registration (hereinafter, the "Howard Depo."), at 28.

Plaintiffs filed a complaint on August 7, 1996, charging that the North Carolina DMV scheme violates their rights under the ADA, and seeking a declaratory judgment. Defendant served its answer on September 26, 1996. Defendant subsequently amended its answer by leave of this Court. On July 11, 1997, both parties filed potentially dispositive motions: Defendant served a Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, and Plaintiffs served a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

ANALYSIS

Eleventh Amendment "Sovereign Immunity"

Defendant asserts that this Court cannot entertain Plaintiff's claims because this action is barred by the Eleventh Amendment to the United States Constitution, which, it argues, bestows sovereign immunity upon the DMV, as an agency of the State of North Carolina. The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

By its words, of course, the Eleventh Amendment does not even invoke the principle of "sovereign immunity." Rather, the Amendment seems to limit the "Judicial power" of the United States bestowed upon the Judiciary by Article III of the Constitution. In Section 2 of that Article the Framers wrote: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl.1. The Constitution then elucidates nine fonts of judicial power, nine distinct but sometimes overlapping ways in which "Cases" may arise to invoke the judicial power of the United States. The last six categories are determined by the status of the parties involved. Among these are "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Id.

In this context, the Eleventh Amendment simply strips the Federal Courts of jurisdiction to hear suits against States

brought by citizens of another State or citizens of a foreign nation. The Supreme Court has dramatically broadened the scope of the Eleventh Amendment's reach, however, creating immunity even in cases clearly outside the plain language of the Amendment. Since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Supreme Court has held that the Eleventh Amendment bars a citizen from bringing suit against his own State in federal court, even though the express terms of the Amendment do not so provide. It is well-established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 687, 121 L.Ed.2d 605 (1993). Such immunity, of course, applies equally to a state agency, such as the DMV here, which is considered an "arm of the State." *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572-73, 50 L.Ed.2d 471 (1977); *Metcalf & Eddy*, 506 U.S. at 144, 113 S.Ct. at 688 ("[A] State and its 'arms' are, in effect, immune from suit in federal court.").

Thus, "for over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, ___, 116 S.Ct. 1114, 1122 (1996) (quoting *Hans*, 134 U.S. at 15, 10 S.Ct. at 507).[1] This principle now applies whether the State is sued by its own citizens or those of other states, and whether it is the State itself being sued or an

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[1] For a thorough list of the Supreme Court's decisions affirming *Hans*, see *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, ___, 116 S.Ct. 1114, 1122 n. 7 (1996).

agency thereof, notwithstanding the express words of the Constitution.

Such a view is compatible with a notion that the Eleventh Amendment was grounded on the concept of complete state sovereign immunity. In fact, the result in *Hans* is mandated if the Eleventh Amendment is understood that way: "[I]f noncitizen suits are barred in law and equity, there is simply no good reason not to extend sovereign immunity to citizen and admiralty suits." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1476 (1987). The problem, of course, is that this result is achieved only by ignoring the words of the Amendment, which makes it seem unlikely that the Eleventh Amendment was written for any purpose other than limiting the nine fonts of federal judicial power delineated in Article III.

Obviously this Court has not the power to overturn 120 years of Supreme Court precedent. It can, however, hew rigidly to the limits on the construction of Eleventh Amendment jurisprudence that the Supreme Court has laid down in the years since *Hans*. Under that line of cases Plaintiffs must clear two hurdles in order to overcome the DMV's assertion of sovereign immunity. First, Plaintiff must show that "Congress has 'unequivocally expressed its intent to abrogate the immunity,' and second, [that] Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1123 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)).

A. Congress' Unequivocal Expression of Intent to Abrogate Sovereign Immunity

This first inquiry is critical, as it reflects the central role played by the Eleventh Amendment in our Federal constitutional structure. "[B]ecause the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States, [the Supreme Court] consistently has held that these exceptions [to sovereign immunity] apply only when certain specific conditions are met. Thus, we have held that a State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-240, 105 S.Ct. 3142, 3145-3146, 87 L.Ed.2d 171 (1985) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974) internal quotations omitted)).

The *Atascadero* Court went on to hold that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 at 246, 105 S.Ct. at 3149. Congress provided the requisite language in Section 502 of the ADA: "A State shall not be immune under the Eleventh Amendment to the Constitution from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

This, by itself, does not suffice. Clearly, Congress intended to abrogate the Eleventh Amendment, but it cannot simply avoid the reach of that amendment by saying that it intends to do so. It must be acting pursuant to a valid grant of congressional authority. Thus, the Court must now

examine the second prong of the *Seminole Tribe* test, and ask whether Congress was acting "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. at 68, 106 S.Ct. at 426. Of course, as the Supreme Court has recognized, there are "certain well-established exceptions to the reach of the Eleventh Amendment." *Id.* at 238, 105 S.Ct. at 3145. Section 5 of the Fourteenth Amendment to the Constitution provides such an exception, giving Congress the power "to enforce, by appropriate legislation, the substantive provisions of the Fourteen Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).[2]

B. The Enforcement Clause of the Fourteenth Amendment Is Not a Source of Authority to Abrogate States' Sovereign Immunity

Congress explicitly drew upon the Fourteenth Amendment in the ADA, stating that the purpose of the law was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

Section 5 of the Fourteenth Amendment is, of course, "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the

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[2] In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), a plurality of the Supreme Court found that the Interstate Commerce Clause also supported congressional abrogation of the Eleventh Amendment. This decision was overruled by *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1128, however, leaving the Fourteenth Amendment as the only recognized source of power to support such an abrogation.

Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723-1724, 16 L.Ed.2d 828 (1966).

The substantive clause of the Fourteenth Amendment, § 1, provides, in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. xiv. In acting pursuant to its "positive grant" of power under § 5 of the Fourteenth Amendment, Congress may only enforce the provisions of § 1. In other words, § 5 is not a grant of plenary power to Congress; it is a grant of power created to enforce, and limited by, the objectives of the Fourteenth Amendment. Thus, as the Supreme Court has recently emphasized, "[t]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based upon the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *City of Boerne v. Flores*, ___ U.S. ___, ___, 117 S.Ct. 2157, 2162, 138 L.Ed.2d 624 (1997) (quoting *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803)).

Congress' power to enforce the Fourteenth Amendment is broad. In *Ex parte Virginia*, 100 U.S. 339, 345-346, 25 L.Ed. 676 (1879), the Supreme Court described the reach of the legislative power under § 5: "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

But Congress does not have unlimited discretion to act under the Fourteenth Amendment merely because it invokes that provision of the Constitution. "As broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (opinion of Black, J.). As the Court said recently, "Congress' power under § 5, however, extends only to enforcing the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326, 86 S.Ct. 803, 817-818, 15 L.Ed.2d 769 (1966)).

In the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), the Supreme Court had an early opportunity to define the remedial scope of the Fourteenth Amendment. In the course of invalidating provisions of the Civil Rights Act of 1875, the Court commented that § 5 did not bestow upon Congress the power to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. . . ." *Id.* at 13-14, 3 S.Ct. at 23. Speaking generally, the Court continued:

> The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon

> Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Id. at 14-15, 3 S.Ct. at 24. The Court in *Boerne*, recently reemphasizing these fundamental ideas, noted that, while "the specific holdings of these early cases might have been superseded or modified, their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned." ___ U.S. at ___, 117 S.Ct. 15 2166.

Indeed, the principles applied to the Fourteenth Amendment by the Court in the *Civil Rights Cases* were recognized by the Court as far back as its seminal decision in *McCulloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819). "The government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted." *Id.* at 405. This bedrock principle of our constitutional jurisprudence is even embedded in the Bill of Rights itself: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

It follows from these principles that if a federal statute -- here the ADA -- is to confer upon the Plaintiffs a right to

sue the State of North Carolina over nonenforcement, it must find some authority in the Constitution under which the states have ceded sovereignty over such affairs to the federal government. Thus, Congress' declaration in the ADA that it was acting pursuant to its authority under the Fourteenth Amendment does not, *ipso facto*, make its exercise of the legislative power valid.

The *Boerne* Court repeated the lessons of Fourteenth Amendment interpretation handed down since the *Civil Rights Cases*, saying that the "Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." ___ U.S. at ___, 117 S.Ct. at 2164. The Fourteenth Amendment has been a powerful tool in protecting individuals from state action that infringes upon individual liberties. But this is where the ADA differs from the typical legislation passed pursuant to Congress' power under § 5 of the Fourteenth Amendment. First, the ADA protects a class of individuals -- the disabled -- who enjoy no heightened constitutional protections. Second, the ADA is not designed for remedial purposes, to promote the "equal protection of the laws" mandated by the Fourteenth Amendment. These arguments will be treated in order.

1. Congress Does Not Have the Power to Declare Heightened Scrutiny for Disabled Individuals as a Class It is well-established under the Supreme Court's equal protection jurisprudence that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). The analogue of that proposition, however, is equally true: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the

same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940) (quoted in *Plyler v. Doe*, 457 U.S. at 216, 102 S.Ct. at 2394).

In reviewing state legislation that is challenged as denying equal protection, the Supreme Court first decides what level of scrutiny the legislation demands. Thus, "when a statute classifies by race, alienage, or national origin," the Court applies "strict scrutiny" and the legislation "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. Similarly, when legislatures classify individuals based on their gender, a "heightened standard of review" is applied. *Id.*

Where, as here, Congress' invokes its power under § 5 of the Fourteenth Amendment, however, federal courts must invert the usual inquiry. The question becomes whether Congress is legislating to protect a class cognizable under § 1 of the Fourteenth Amendment. If not, even if it explicitly invokes it, Congress may not ground its action on the Fourteenth Amendment.

In the instant case, the ADA cannot be said to protect a class of individuals entitled to heightened constitutional protections. Before the enactment of the ADA, it was clear that the Supreme Court was not treating disabled individuals as a cognizable class entitled to heightened constitutional protections. In denying such treatment to the mentally retarded in *Cleburne*, the Court wrote: "[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part

of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so." *Id.* at 445, 105 S.Ct. at 3257. The same reasoning applies to the physically disabled as well.

Commentators and some courts have called into doubt the Supreme Court's approach to disabled individuals since the passage of the ADA in 1990. Some of this confusion no doubt stems from Congress' statement of the findings which contributed to the ADA, wherein it wrote: "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals. . . ." 42 U.S.C. § 12101(a)(7).

By invoking the language of suspect classification, the now-familiar mantra of "discrete and insular minorities" from Footnote 4 of *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938), Congress may have been attempting to force the courts to treat the disabled as a suspect class for equal protection purposes. Even if Congress was trying to pressure the courts and the states, this Court remains cognizant of what the Supreme Court stated in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

However, it seems more likely that Congress was merely availing itself of its fact-finding powers and pointing out to the courts that the disabled have suffered historically in this country. This is well noted and not subject to dispute.

The Supreme Court is mindful of the distinction between Congress' powers under the Enforcement Clause and the constitutionally prescribed limits on those powers: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed." *Boerne*, ___ U.S at ___, 117 S.Ct. at 2164.

In striking down the Religious Freedom Restoration Act ("RFRA"), the *Boerne* Court was analyzing the question of religious liberty under the due process clause of the Fourteenth Amendment. Nevertheless, the Court's holding that Congress only has the power to enforce substantive protections, rather than to declare them, translates easily to the equal protection clause. *See Bartlett v. Bd. of Law Examiners*, 970 F.Supp. 1094, 1134 (S.D.N.Y. 1997) (holding that Congress would exceed its authority in attempting to alter the level of scrutiny afforded the disabled under the ADA). At bottom, "Congress does not enforce a constitutional duty by changing what the right is." *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164. So Congress cannot force the courts to adopt a new regime vis-a-vis the classification of individuals with disabilities.

This leaves Congress free to utilize its superior fact-finding abilities to suggest to the courts that disabled people should henceforth receive more constitutional protection. If, indeed, this is what Congress intended with the ADA, it is incumbent upon the Supreme Court to make that determination. The lower courts should merely interpret and apply the decisions of the Supreme Court, and it is not their role to reshape Supreme Court decisions in light of new information. The Supreme Court recently reminded lower

courts that "if a precedent of this Court has direct application in a case," the lower court should follow the earlier case, "leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989) (quoted in *Agostini v. Felton*, ___ U.S. ___, ___, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997)). Because the Supreme Court held in *Cleburne* that disabled people are not a class entitled to increased Fourteenth Amendment protection, this Court cannot now decide that Congress had the power to declare otherwise in the ADA. Thus, Congress is outside of its Enforcement Clause authority in attempting to abrogate North Carolina's sovereign immunity with the ADA.

2. The ADA Is Not Remedial Legislation; It Singles Out a Class for Special Treatment Another reason that the ADA is an inappropriate attempt by Congress' exercise its power under the Fourteenth Amendment is that the statute is not "remedial" in the same sense as are most anti-discrimination statutes enacted under the Enforcement Clause. Title VII of the Civil Rights Act of 1964 is a prototypical example of a statute which seeks a state of affairs where individuals are treated equally, without regard to race, sex, or age. The ADA, on the other hand, seeks to single out the disabled for special, advantageous treatment. In other words, the ADA demands entitlement to achieve its goals. This is beyond the purview of the Enforcement Clause as the concept of entitlements has little to do with promoting the "equal protection of the laws."

Of course, most legislation passed by Congress "discriminates," in some sense of the word, against classes of individuals. As the Supreme Court has said, upholding the constitutionality of an Oklahoma statute which treated

optometrists differently than ophthalmologists: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . The prohibition of the Equal Protection Clause goes no further than invidious discrimination." *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-89, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955).

More recently, the Court has said: "Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution." *Clements v. Fashing*, 457 U.S. 957, 967, 102 S.Ct. 2836, 2845, 73 L.Ed.2d 508 (1982). Inverting the analysis to apply to Congress' attempt to invoke the Equal Protection Clause to exercise its authority, the ADA does not remediate invidious, arbitrary, or irrationally made classifications. At least as concerns the public accommodation provisions at issue here, the ADA would force States to single out disabled individuals for advantageous treatment. This is not within Congress' power under the Fourteenth Amendment's Equal Protection Clause.

C. *Ex parte Young* Does Not Prevent the Operation of the Eleventh Amendment

In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court held that the Eleventh Amendment did not foreclose a suit to enjoin as unconstitutional the actions of a state official. "This holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such

action is a nullity." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986). In limiting the applicability of *Young* in the intervening years, the Supreme Court has held that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green v. Mansour*, 474 U.S. at 68, 106 S.Ct. at 426 (internal citations omitted).

The Plaintiffs in the instant matter are suing the DMV for repayment, with interest, of all sums charged for the disabled parking placards. Plaintiffs are seeking compensation for the previously charged five dollar fees; this action is thus not within the limits on the Eleventh Amendment denoted by *Ex parte Young*.

The oft-cited "rule" of *Edelman v. Jordan*, that the Eleventh Amendment bars suits against States for retroactive monetary relief, but not for prospective injunctive relief, 415 U.S. at 664-665, 94 S.Ct. at 1356-1357, is also inapplicable to the instant action. The decision in *Ex parte Young* was predicated on the notion that a suit challenging a state official's action is not, in effect, a suit against the state. This logic does not obtain when the suit is against the state itself or a state agency; it only applies when individual state officials are sued in their official capacity. When the State itself is sued, "the relief sought by a plaintiff . . . is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1124.

The Supreme Court discussed this at length in *Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982),

where it held that the administrator of an estate could not sue two states under the federal interpleader act for seeking to tax the estate on the basis of inconsistent claims. In *Cory*, the Court of Appeals for the Fifth Circuit had held that *Edelman* meant that the suit could proceed because the interpleader plaintiff had sought only prospective relief. 629 F.2d 397 (5th Cir. 1980). The Supreme Court explained: "*Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought." *Cory*, 457 U.S. at 90, 102 S.Ct. at 2328-2329.

Again, the instant case is not within the *Ex parte Young* confines. The Plaintiffs are suing the DMV itself, an arm of the State of North Carolina; they are not suing a state official. There is thus no question of invoking the legal fiction created by the Supreme Court in *Young*.

CONCLUSION

The Supreme Court in *Seminole Tribe* concisely summarized the nature of the Eleventh Amendment inquiry: The "inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" 517 U.S. at ___, 116 S.Ct. at 1124. The end result of this reasoning, and the answer to this question, is that Congress improperly invoked the Fourteenth Amendment to facilitate the ADA's putative abrogation of the sovereign immunity of the States. Thus the Eleventh Amendment is a properly asserted defense for the North Carolina DMV in the instant action.

For the reasons discussed above, this action is barred by the Eleventh Amendment. Although it attempted to invoke its powers under the Fourteenth Amendment, Congress has not the authority to do so to effectuate the ends of the ADA. Because the State of North Carolina has not consented to suit under this statute, this Court lacks subject matter jurisdiction to hear this action, and it must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendant's Motion to Dismiss is GRANTED, and Plaintiffs' Motion for Summary Judgment is therefore rendered moot.

SO ORDERED.

This 28th day of November, 1997.

/S/
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 11, 1999

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	No. 97-2784
	)	CA-96-689-5-BO
UNITED STATES OF AMERICA,	)	
Intervenor,	)	
v.	)	
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant-Appellee.	)	

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing with suggestion for rehearing en banc.

On the petition for rehearing before the panel, Judge Murnaghan voted to grant rehearing, and Chief Judge Wilkinson and Judge Moon (United States District Judge for the Western District of Virginia, sitting by designation) voted to deny rehearing. The petition for rehearing before the panel is thereby denied.

A member of the Court requested a poll of the Court on the suggestion for rehearing en banc, and a majority of the judges voted to deny rehearing en banc. Judges Murnaghan, Michael, and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Ervin, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler, and King voted against rehearing en banc.

It is ORDERED that the petition for rehearing and suggestion for rehearing en banc is denied.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 5 of the Fourteenth Amendment to the United States Constitution provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Federal Regulation

28 C.F.R. § 35.130(f) provides:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this Part.

North Carolina Statute

North Carolina General Statutes § 20-37.6 provides:

> (a) General Parking.--Any vehicle that is driven by or is transporting a person who is handicapped and that displays a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard may be parked for unlimited

periods in parking zones restricted as to the length of time parking is permitted. This provision has no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. Any qualifying vehicle may park in spaces designated as restricted to vehicles driven by or transporting the handicapped.

(b) Handicapped Car Owners; Distinguishing License Plates.--If the handicapped person is a registered owner of a vehicle, the owner may apply for and display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive one removable windshield placard.

(c) Handicapped Drivers and Passengers; Distinguishing Placards.--A handicapped person may apply for the issuance of a removable windshield placard or a temporary removable windshield placard. Upon request, one additional placard may be issued to applicants who do not have a distinguishing license plate. Any organization which, as determined and certified by the State Vocational Rehabilitation Agency, regularly transports handicapped persons may also apply. These organizations may receive one removable windshield placard for each transporting vehicle. When the removable windshield or temporary removable windshield placard is properly displayed, all parking rights and privileges extended to vehicles displaying a distinguishing license plate issued pursuant to subsection (b) shall apply. The removable

windshield placard or the temporary removable windshield placard shall be displayed so that it may be viewed from the front and rear of the vehicle by hanging it from the front windshield rearview mirror of a vehicle using a parking space allowed for handicapped persons. When there is no inside rearview mirror, or when the placard cannot reasonably be hung from the rearview mirror by the handicapped person, the placard shall be displayed on the driver's side of the dashboard. A removable windshield placard placed on a motorized wheelchair or similar vehicle shall be displayed in a clearly visible location. The Division shall establish procedures for the issuance of the placards and may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard.

(c1) Application and Renewal; Physician's Certification.--The initial application for a distinguishing license plate, removable windshield placard, or temporary removable windshield placard shall be accompanied by a certification of a licensed physician, ophthalmologist, or optometrist or of the Division of Services for the Blind that the applicant is handicapped. The application for a temporary removable windshield placard shall contain additional certification to include the period of time the certifying authority determines the applicant will have the disability. Distinguishing license plates shall be renewed annually, but subsequent applications shall not require a medical certification that the applicant is handicapped. Removable windshield placards shall be renewed every five years, and the renewal shall require a medical recertification that the person is

handicapped. Temporary removable windshield placards shall expire no later than six months after issuance. ...